Filed 8/12/19 P. v. Rojaz-Chavez CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. EMILIO ALEJANDRO ROJAS-CHAVEZ, Defendant and Appellant.	G056057 (Super. Ct. No. 14NF3770) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Reversed.

Kenneth H. Nordin, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, Lynn McGinnis and Amanda E. Casillas, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Emilio Alejandro Rojas-Chavez was convicted of conspiracy to commit robbery and attempted robbery and sentenced to two years in prison. The only point he raises in this appeal is whether the court erred by allowing a prosecution witness, the named victim in the attempted robbery, to testify out of order. Defendant was thereby forced to decide whether to testify before the prosecution had rested its case. He ultimately decided to testify.

We agree with both parties that the court erred. The only question is whether the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18 (*Chapman*).) The witness who testified out of order filled in crucial gaps in the prosecution's case, and she was the only witness who testified to a rather damning statement that negated defendant's version of what had happened. Further, it appears from the record that the prosecutor used defendant's testimony in crafting his questions for this critical witness. Taken together with some jury questions that reflected doubt about defendant's culpability, we cannot find that the error was harmless beyond a reasonable doubt, and we reverse the judgment.

I

FACTS

During April and May 2014, Mary Frederickson, the owner of a Sonic burger restaurant (Sonic) in Anaheim, employed an individual named Chris Mullins as a cook. Mullins and his girlfriend lived in the garage of Frederickson's home at this time. Mullins was not a model employee, and was described as "bad tempered" and "rude."

On May 14, Mullins "made a big scene and walked out" and his employment was terminated. The same day, Frederickson asked Mullins and his girlfriend to move out of her garage.

Defendant arrived at the home and helped Mullins move out. Mullins became threatening toward Frederickson and said he would burn her house down.

Frederickson called her daughter, Maria Paz, who also lived at the house and worked at Sonic. When she arrived, defendant was standing near his car, and made a "smartass remark" to her.

On May 25, at approximately 1:30 a.m., Mullins and defendant went to a Walmart that was in the same parking lot as Sonic. Mullins purchased a BB gun without an orange tip on the barrel (which would have signified it did not use bullets), and defendant bought sheer women's stockings. Defendant's actions and his vehicle were recorded by Walmart security cameras.

At around 2:30 a.m., after Sonic had closed, Ana Sambrano, a manager, was cleaning up with three other employees when Mullins and defendant entered Sonic wearing masks. Mullins, holding the BB gun, stated it was a holdup or a robbery. Mullins grabbed Sambrano by the hair and pushed her toward the back of the restaurant, demanding she open the safe. Sambrano could not open the safe because she was still in training and did not know the combination.

Defendant told Mullins they weren't looking for Sambrano, they were looking for "Trini," referring to Trinidad Garcia, another manager, who had the safe combination. Mullins threw Sambrano to the ground, and then Mullins and defendant walked to the rear of the restaurant.

Brian Lopez, another Sonic employee, was mopping the floor when he heard someone walk through the front doors. He saw defendant and Mullins asking for Garcia when they saw and approached him. They asked him where Garcia was, with Mullins pointing the gun at him. He testified that defendant looked "scared." Mullins hit him over the head with the gun, and kept asking the same question about Garcia before moving to the back of the store. The attack on Lopez was recorded by security cameras. Lopez's head was bleeding and he was lying on the floor. Lopez saw another cook, Randolph Latimore, start to enter the restaurant, but Lopez "gave him the signal to go away with my eyes."

The manager that defendant and Mullins were looking for, Garcia, was outside when he saw Latimore exit the restaurant. Latimore told him to leave because they were being robbed. Garcia looked over and saw Mullins leaving the building, recognizing him by both sight and voice. Mullins threatened to kill him. Garcia ran towards Walmart, and Mullins chased him part of the way. When Garcia arrived at Walmart, he asked the manager to call the police.

Mullins was arrested around 10:00 a.m. the next morning at a nearby motel. In Mullins's room, the police found Sambrano's purse, packaging and an instruction manual for a BB gun, a Walmart bag, and a women's stocking. Mullins was carrying Sambrano's cell phone.

The police arrested defendant two days later. Police found packaging for women's stockings, stockings, and clothing consistent with what defendant was wearing at Walmart and Sonic in his car.

Defendant was charged by amended information with three counts: conspiracy to commit robbery (Pen. Code, §§ 182, subd. (a)(1), 211/212.5, subd. (c),[1] count one); second degree burglary (§§ 459, 460, subd. (b), count two); and second degree attempted robbery of Sambrano (§§ 664, subd. (a), 211/212.5, subd. (c), count three). Shortly before trial, the court granted the prosecutor's motion to dismiss count two, and the second degree robbery charge became the new count two.

Trial

Trial began on January 24, 2018, and testimony began on January 29. Frederickson testified, followed by Lopez, Garcia, Paz, two Walmart employees, and two police officers. The prosecutor then advised the court that Sambrano, who was expected to testify that day (January 30) was ill with the flu, and requested she be permitted to

[1] Subsequent statutory references are to the Penal Code.

testify the following day. The prosecutor proposed that he finish with his last three witnesses, who were expected to testify briefly, then "potentially go into the defense case. With the understanding that the People could reopen just for that one last witness perhaps tomorrow morning." The prosecutor expected Sambrano's testimony would not take very long.

The defense objected to proceeding with its case before Sambrano had testified, and specifically to being required to decide whether defendant would testify. The court decided the prejudice to defendant would not be "very severe" from allowing Sambrano to testify the next day, and proceeded over defendant's objection. The trial then proceeded with the prosecution's last three law enforcement witnesses.

Defendant testified next. He claimed he had met Mullins shortly before the incident when Mullins contacted him to buy medical marijuana through an advertisement on Craigslist. He admitted being present at Frederickson's home on the day Mullins and his girlfriend moved out, but denied making any remarks to Paz.

On the day of the robbery, defendant testified Mullins contacted him to buy marijuana, so they met and defendant agreed to give Mullins a ride to Walmart. He said Mullins was incoherent and talking about getting back at people and being fired from Sonic. Mullins said he needed to "get a strap."[2] Defendant claimed he tried to calm Mullins down. Defendant followed Mullins into Walmart, stating he had a "responsibility" because he "knew he was a danger to the public." He claimed he bought the stockings to cover his face like "a hero." "Like I was going to try to talk him out of it, but if that didn't work, I would have to physically stop him. I didn't want to tell the story to . . . the police like I am right now . . . ."

After buying the stockings, defendant waited in his car. When Mullins returned from the Walmart, he "attempt[ed] to talk him out of it." Defendant moved the

[2] This is slang for "gun."

car to a more isolated location farther away from the Walmart entrance, and they smoked marijuana together. After about 15 minutes, Mullins "stormed out" and began pacing, and then "stormed into" Sonic.

Defendant testified that he followed Mullins into Sonic because he was afraid Mullins might hurt someone. He claimed he pulled Mullins away from Sambrano. He left after Mullins chased Garcia toward Walmart. Mullins followed him and got into his car, defendant testified, but he made Mullins leave after Mullins showed defendant Sambrano's purse. He claimed he never had an agreement with Mullins to rob Sonic, and he was not with Mullins when Mullins stole the purse. Several character witnesses testified defendant was a peaceful and honest person who did not steal.

Sambrano testified the next day, January 31. Sambrano's testimony filled in some gaps left by other witnesses, including defendants' initial behavior when he entered the restaurant with Mullins and their inquiries about the safe. Specifically, as discussed above, she testified that defendant said, "'No, not her, Trini,'" after Mullins told her to open the safe. She also testified about the theft of her purse and cell phone.

Closing arguments and jury instructions followed. The jury was sent to deliberate at 3:34 p.m. At 5:02 p.m., the jury requested clarification of the attempted robbery count, sending the following questions: "(1) even though he [defendant] didn't have the gun or anything possessed in the undl [*sic*] after the crime) [*sic*] would he still be guilty by association? (2) Robbery vs petty theft: if he is just there and didn't have fear or force would it make it petty theft? Or guilt by association[?]" The jury then left for the evening, and the court discussed the questions with counsel.

The court responded when the jury returned the next morning, at 9:04 a.m.: "'Frankly, we do not understand the questions, which we realize were written in haste at the end of the day. Both questions refer to "guilty/guilt by association." These are not legal terms and are not used in the jury instructions. Please rephrase/explain your questions, and we will try to answer them.'"

The jury did not resubmit any questions. At 9:32 a.m., the jurors notified the bailiff they had reached a verdict.

The jury found defendant guilty of both remaining counts, conspiracy to commit robbery and attempted robbery. Defendant was sentenced to the low term of two years on the conspiracy count and the middle term of two years on the attempted robbery count, stayed pursuant to section 654. Defendant now appeals.

II

DISCUSSION

Error

Defendant's sole claim on appeal is that the trial court erred, resulting in prejudice, when it permitted Sambrano to testify out of order, thereby forcing defendant to decide whether to testify before the prosecution had rested its case. The Attorney General concedes the error, admitting that under the circumstances, "it was unreasonable for the trial court to order appellant to start his defense."

We agree. While this might have been a permissible exercise of discretion if this irregularity involved other defense witnesses, the decision to have the defendant testify implicates his rights under the Fifth Amendment of the United States Constitution. The order of testimony may not be departed from in a way that limits a defendant from "deciding whether, and when in the course of presenting his defense, the accused should take the stand." (*Brooks v. Tennessee* (1972) 406 U.S. 605, 613 (*Brooks*); see *People v. Cuccia* (2002) 97 Cal.App.4th 785 (*Cuccia*).)

In *Brooks*, the United States Supreme Court overturned a Tennessee statute on this point as unconstitutional. That statute required the defendant to testify before other defense witnesses or forfeit the right to testify altogether. (*Brooks*, *supra*, 406 U.S. at p. 606.) The court held the statute interfered with the Fifth Amendment right against self-incrimination by penalizing the defendant for his or her initial silence. (*Ibid*.) The

defendant was forced to decide whether to testify before hearing all of the evidence and was deprived of due process because defense counsel was restricted in deciding how to present the case. (*Id.* at pp. 611-613.)

In *Cuccia*, this court held that the cumulative errors of forcing the defendant to testify out of order and refusing to allow him to testify after the prosecutor was allowed to reopen rebuttal violated the defendant's due process right to a fair trial. (*Cuccia, supra*, 97 Cal.App.4th at p. 789.) The trial judge had warned counsel at the beginning of trial to have ample witnesses available to avoid having the jury inconvenienced. It threatened to rule that counsel had rested its case if it ran out of witnesses. After the defense's sixth witness was called, but could not be located, the trial court reminded defense counsel of this warning. In the presence of the jury, the trial court said it recalled that the defense had planned to have the defendant testify and asked defense counsel if the defendant had changed his mind. Counsel did not object, and the defendant's testimony occupied the rest of the day. (*Id.* at pp. 790-791.)

This court concluded this was error, and found the defendant's decision to testify "was coerced based on the trial court's threat to consider his case rested if he did not testify." (*Cuccia, supra*, 97 Cal.App.4th at p. 791.) This was an abuse of discretion under the circumstances. (*Id.* at p. 792.) "Here, the missing witness incident occurred mid-afternoon in the middle of the defense's case. There is nothing in the record to show defendant was less than diligent in securing the witness's presence for trial that day, and the witness appeared the next morning and testified. Although not requested, a brief continuance would have allowed defendant to present his other witnesses before deciding if he wanted to testify." (*Ibid.*)

The same is true here. The trial was running ahead of schedule. The prosecutor anticipated that Sambrano would be able to appear in court the next day, January 31. Defense counsel objected to defendant testifying out of order and requested

a recess, which the court refused, stating it did not believe "the prejudice is very severe for the defendant."

We conclude this was error. The defendant was deprived of due process by not being able to hear all of the evidence against him before deciding whether to testify, and because his counsel was not able to control the presentation of the defense. (*Brooks*, *supra*, 406 U.S. at pp. 611-613.) A short continuance would have avoided this situation entirely, and it was error not to grant it.

Prejudice

The only remaining question, therefore, is whether defendant was prejudiced. We apply the standard found in *Chapman*, *supra*, 386 U.S. 18, which requires us to find the error is harmless beyond a reasonable doubt before we can permit the verdict to stand. (*Cuccia*, *supra*, 97 Cal.App.4th at p. 791.)

The Attorney General argues that the error was harmless beyond a reasonable doubt because defendant does not claim that his testimony would have been different if he had decided whether to testify after Sambrano's testimony, and further, that the jury still would have found defendant guilty because of the significant evidence against him.

But the burden here is not on defendant to show what he would have done differently – it is on the Attorney General to show that what did happen was not unduly prejudicial. What happened was that the named victim of the attempted robbery charged in count two testified out of order. She filled in some important gaps in the testimony of other witnesses. Key among them is that Sambrano was the only witness[3] to testify that

[3] Lopez's testimony as to what defendant said was, at best, confused. He testified that both men were asking for Garcia, but he had also told a defense investigator that defendant had not said anything. Once reminded of this, he testified defendant did not ask him where Garcia was.

defendant was an active participant at Sonic. After Mullins ordered her to open the safe, Sambrano testified, defendant said to Mullins, "'No, not her, Trini.'"

This directly contradicted defendant's testimony the previous day, in which defendant portrayed himself as someone who was only out to protect others from Mullins's out-of-control conduct. Instead, it placed him directly in the center of events as a conspirator to commit the robbery; someone who hadn't followed Mullins into Walmart to watch what he was doing and try to stop him, but had the intent of participating in the robbery. This testimony was a major blow to defendant's credibility.

Further, having had the advantage of listening to defendant's testimony, the prosecutor was able to craft his questioning of Sabrano accordingly. Defendant had testified that once Mullins headed toward Sonic, "there was nothing I could do. He went in there. And before he could harm . . . Sambrano . . . you know, I stopped him from doing that, you know. I separated the two. Got in between them. I told her – I saw how scared she was. I told her everything is going to be okay."

The prosecutor asked Sambrano what happened after she told Mullins she couldn't open the safe. She replied: "He had me like this with his gun, then he threw me down to the floor. So I just stayed there for a minute and I just watched them and they walked to the back.

"Q: Did the other person, the person who did not have the gun, did he say anything to you at that time when he went to the ground?

"A: I don't think so.

"Q: Did he try to help you in any way?

"A: No.

"Q: Did he grab the guy with the gun and tackle him or anything like that?

"A: No."

Perhaps if the prosecutor had not had the benefit of defendant's testimony, he would have asked identical questions. We cannot know for certain. But it certainly appears that the

prosecutor elicited this testimony in order to directly contradict defendant's testimony, in the starkest manner possible. By comparison, the testimony of Lopez, the cook, and Garcia, the manager, was not as damaging to defendant, nor as pointedly contradictory. Lopez testified that defendant looked nervous, like he did not know what he was doing, and was following Mullins around. Garcia did not offer anything specific about defendant, stating that when Mullins came outside and began to chase him, he did not see anyone with Mullins.

In addition to the nature of Sambrano's testimony and the prosecutor's ability to use his knowledge of defendant's testimony to its best advantage, there are also the questions the jury submitted at the end of the first day of deliberations. While we agree with the court that the questions were confusing, they do indicate to us at least some uncertainty on the jury's part about the nature of defendant's participation and culpability.

The *Chapman* court stated that based on the court's error, it was "impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the [error] did not contribute to petitioners' convictions." (*Chapman*, *supra*, 386 U.S. at p. 26.) We must reach the same conclusion here. It is simply not possible for us to say beyond a reasonable doubt what might have happened here if the testimony had proceeded in the proper order. Perhaps defendant would not have testified at all, or maybe he would have testified differently – it is not difficult to envision that in either event, given the jury's doubts about his culpability, that he might have been better off. He was certainly worse off for having his testimony directly and pointedly contradicted by Sambrano.

Our conclusion that reversal is compelled here should not be mistaken for a belief that we found the evidence against defendant weak. The evidence was quite strong, given the testimony by the prosecution's witnesses and the surveillance footage. Defendant's self-serving tale of heroism was quite farfetched. It is possible, even more

likely than not, that the jury would have found defendant guilty anyway. But we cannot conclude, based on this record, that the error was harmless beyond a reasonable doubt.

III

DISPOSITION

The judgment is reversed.

MOORE, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.